LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
NOV 13 1956
JOHN T. FEY, Clerk

No. —— 45

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, PETITIONER

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
RALPH S. SPRITZER,
Assistant to the Solicitor General,
MELVIN RICHTER,
MORTON HOLLANDER,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Reasons for granting the writ	7
Conclusion	14
Appendix A:	
1. Opinion of the court of appeals	15
2. Judgment of the court of appeals	25
Appendix B: Letter of Comptroller General of the United States	25
Appendix C: Discussion of Background and History of Section 322 of the Transportation Act of 1940	27

CITATIONS

Cases:	
Atlantic Coastline R. R. v. *United States*, 140 F. Supp. 569	12
Commercial Corp. v. *New York Barge Corp.*, 314 U. S. 104	11
Federal Trade Commission v. *Morton Salt*, 334 U. S. 37	11
Grand Trunk Western Railway Co. v. *United States*, 252 U. S. 112	9
S. E. C. v. *Ralston*, 346 U. S. 119	11
Selma, Rome &c. Railroad v. *United States*, 139 U. S. 560	11
United States v. *Denver & R. G. R. R.*, 191 U. S. 84	11
United States v. *Western Pacific Railroad*, No. 18, this Term	8
Statutes:	
Interstate Commerce Act, 24 Stat. 380, as amended, 49 U. S. C. 3 (2)	27
Transportation Act of September 18, 1940, Section 322, 54 Stat. 955, 49 U. S. C. 66	2, 3, 7, 8, 10, 11, 27, 32
Tucker Act, 24 Stat. 505, Sec. 6, as amended, 28 U. S. C. 1346 (a) (2)	3, 10

Miscellaneous: Page

F. R. Civ. P., Rule 55 (e) 10
H. Doc. No. 583, 75th Cong., 3d Sess., pp. 1–2 27
H. R. 10620, 75th Cong., 3d Sess 29, 30
H. R. 2531, 76th Cong., 1st Sess., Sec. 501 [84 Cong. Rec. 345] 30, 31
H. R. 4862, 76th Cong., 1st Sess., Secs. 201, 202 [84 Cong. Rec. 2512] 30, 31
H. Rept. 1217, 76th Cong., 1st Sess., p. 28 32
H. Rept. 2016, 76th Cong., 3d Sess 32
H. Rept. 2832, 76th Cong., 3d Sess 32
H. Rept. No. 308, 80th Cong., 1st Sess., p. A 239 10
Hearings before House Committee on Interstate and Foreign Commerce on H. R. 10620, 75th Cong., 3d Sess., June 1, 1938, pp. 34–35 30
Hearings before House Committee on Interstate and Foreign Commerce on H. R. 2531, 76th Cong., 1st Sess.:
January 24, 1939, p. 17 27
February 24, 1939:
p. 472 31
pp. 652–653 31
Hearings before House Committee on Interstate and Foreign Commerce on H. R. 4862, 76th Cong., 1st Sess., March 7–30, 1939, p. 1101 31
Letter of October 5, 1937, from Association of American Railroads to Procurement Division, Treasury Department 28
Notes of Advisory Committee on Rules of Civil Procedure, S. Doc. No. 101, 76th Cong., 1st Sess., p. 271 10
S. 3876, 75th Cong., 3d Sess., Sec. 2 29, 30
S. 1915, 76th Cong., 1st Sess., Sec. 2 [84 Cong. Rec. 3143] 30, 31
S. 1990, 76th Cong., 1st Sess., Sec. 2 [84 Cong. Rec. 3509] 30, 31
S. 2009, 76th Cong., 1st Sess 31
S. Rept. 433, 76th Cong., 1st Sess 27, 31
Traffic World, The:
June 4, 1938, p. 1310 27
June 11, 1938, p. 1353 27
January 14, 1939, pp. 62, 94 27
September 14, 1940, p. 615 27

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above case on August 10, 1956.

OPINIONS BELOW

The oral opinion of the United States District Court for the District of Massachusetts (R. 39)[1] is not reported. The opinion of the court of appeals (App. A, p. 15) is reported at 236 F. 2d 101.

[1] All "R." or record references are to the pages of "Appellant's Record Appendix" printed for the use of the court below and filed here pursuant to Rule 21 of this Court.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1956 (App. A, p. 25). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). By order of Mr. Justice Frankfurter, dated November 5, 1956, the time for filing a petition for a writ of certiorari was extended to November 15, 1956.

QUESTIONS PRESENTED

The United States, in shipping naval property by rail in 1944, ordered freight cars of a certain size. Cars larger than those ordered were furnished and proportionately higher charges were imposed. Pursuant to Section 322 of the Transportation Act of 1940, the Government promptly paid the bills presented. On post-audit, the Government questioned the higher charges—which, concededly, can only be justified if no cars of the type ordered were in fact available to the carrier—and it offset the difference (in conformity with Section 322) against a later transportation bill submitted by the carrier for other services. The carrier thereupon brought suit on the later transportation bill, claiming that it was entitled to the full amount of that bill undiminished by the Government's deduction. The following questions are presented:

1. Whether, as the Government contends, the carrier had the burden of proving that its charges for the original services were correct or whether, as the courts below held, Section 322 shifts to the United States the burden of proving that they were excessive.

2. Whether, even assuming that under Section 322 the Government has the burden of establishing the incorrectness of a carrier's charges, such burden extends to facts (such as unavailability of cars of the type ordered) peculiarly within the knowledge of carriers or accessible to them.

STATUTE INVOLVED

Section 322 of the Transportation Act of September 18, 1940, 54 Stat. 955, 49 U. S. C. 66, provides as follows:

> Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

STATEMENT

This action was brought against the United States by respondent New York, New Haven and Hartford Railroad Company under the Tucker Act, 24 Stat. 505, as amended, 28 U. S. C. 1346 (a) (2), to recover sums due it for transporting Government property (R. 3–4). The pertinent facts are undisputed and may be summarized as follows:

During September and October, 1944, the Government shipped several carloads of naval supplies to

Massachusetts and Rhode Island (R. 8, 9, 11, 13, 15, 18, 21–22, 24, 25, 27, 28, 30, 32). Each shipment was made under a Government bill of lading which called for an open freight car of specified length (R. 24, 26, 28, 30, 31). The following month, respondent, the terminal carrier, presented bills to the Government for these transportation services (R. 10, 13, 16, 18, 22, 25, 27, 29, 30, 32).[2] Pursuant to Section 322 of the Transportation Act of 1940, *supra*, page 3, the bills were paid promptly upon presentation, without prior audit by the General Accounting Office (R. 10, 13, 16, 18, 22, 25, 27, 29, 30, 32; App. A, p. 16).

Thereafter, the bills were post-audited by the General Accounting Office (R. 25, 27, 29, 30–31, 32). The audit revealed (1) that in each instance the initial carrier had furnished a freight car larger than that ordered by the Government in the bill of lading, and (2) that the charges in the bills had been computed upon the basis of the minimum weight fixed for cars of the size *furnished*, rather than the minimum weight fixed for cars of the size *ordered* (R. 24–25, 26, 28, 30, 31–32). In view of the complete absence of any showing that the initial carriers were not able to furnish cars of the size ordered, and in view of the further fact that "such information is peculiarly within the knowledge of plaintiff [respondent] and/or the initial carrier," the General Accounting Office, in 1950, claimed a refund for the difference between the charges for the cars ordered and those furnished (R.

[2] The terminal carrier, as provided in the Standard Government Bill of Lading used in the shipments in question, acts as agent for all participating carriers in collecting shipping charges.

24–25, 27, 28, 29, 30–31, 32). Respondent was promptly so advised on Standard G. A. O. Form No. 1003 (R. 25, 27, 29, 31, 32). This form states that unless the overpayment is refunded within sixty days, it will be deducted pursuant to Section 322 from any other amount "subsequently found to be due such carrier" (*supra*, p. 3).

Respondent ignored the refund demands. Deduction was accordingly made from a bill submitted by respondent in June, 1951 (for certain 1950 transportation), and paid (after deduction) the following month (R. 26, 28, 29, 31, 33).

Respondent filed this action in the district court on May 14, 1953, alleging (1) the performance of the later (1950) transportation service; (2) the billing of the Government for that service in the amount of $1,143.03, representing the lawful charges under applicable tariffs; and (3) the Government's refusal to pay the bill as rendered (R. 3–4). The complaint alleged no facts relating to the 1944 shipments upon which the Government predicated its deduction. The relief sought was the recovery of the entire amount of the bill for the 1950 transportation (R. 4).

In a substitute answer, the Government admitted the performance of the 1950 transportation service and the correctness of respondent's charges for that service (R. 5). It asserted, however, that respondent had been paid in full, $117.77 having been paid to it by check and the balance having been credited against the overpayments on the 1944 bills (R. 5). The answer explained the basis of the determination of overpayment and alleged that respondent at no

time furnished the Government with facts respecting its failure to furnish cars of the size ordered (R. 6).

Respondent filed a response described as "Plaintiff's Answer to Defendant's Counterclaim" (R. 6). This response admitted receipt of the $117.77 check but denied that the Government was overcharged on the 1944 shipments. The issue was thus narrowed to the correctness of the original charges demanded by the carrier and paid by the Government in 1944.

Thereafter, the district court ruled that the burden of establishing the essential facts relating to the 1944 transportation service, *i. e.*, that the carriers could not have furnished cars of the type that the Government ordered, rested on the United States (R. 39). On the basis of this ruling, the court, on November 23, 1955, entered summary judgment for respondent in the amount of $402.84 (R. 43–44).[3]

The court of appeals affirmed. The opinion points out that, prior to the enactment of Section 322 in 1940, the Government did not pay transportation bills until it determined, on the basis of a detailed pre-audit by the General Accounting Office, that the charges were correct (App. A, p. 19). Under that practice, if the charges were found to be excessive and a lesser amount was paid by the Government, the carrier in bringing a suit for the difference "of course * * * would have the burden" of proving the underpayment (App. A, p. 19). The opinion also observes that Section 322 was enacted as "remedial legislation passed at the behest of the carriers, who

[3] This figure was reached following an agreement between the parties allowing the Government a credit of $622.42 (R. 39–41).

had complained of the inordinate delays of the pre-audit procedure theretofore prevailing which resulted in tying up large amounts of accounts receivable" (App. A, p. 20). The court concluded, however, that prompt, unaudited payment by the Government, pursuant to Section 322, permanently frees the carrier of the burden of justifying its charges and that an administrative offset, made after audit and effectuated in conformity with the statute, is insufficient to put the carrier to its proof (App. A, p. 24).

REASONS FOR GRANTING THE WRIT

The decision below treats Section 322 (*supra*, p. 3) as effecting a basic change in the rights of the United States, as shipper, *vis-à-vis* common carriers. As interpreted, the section does not merely give the carrier the advantage (which Congress plainly intended to confer) of prompt payment, *i. e.*, freedom from the delays which are the necessary incident of a Government pre-audit; it accomplishes the further result that, if post-audit reveals the probability that an overpayment has been made, the carrier can no longer be put to its proof that its original charges were correct. The latter result, we shall urge, sharply departs from the legislative purpose.

The question whether the post-audit procedures contemplated by Section 322 strip the Government of the protection which it theretofore enjoyed under its pre-audit practice is one of manifest practical importance. Available figures received from the General Accounting Office show that the Government audited more than seventeen million freight and passenger bills

during the past eight years.[4] Questions as to the correctness of transportation charges are very substantial in number.[5] And we find that in various types of cases, as in the class of cases of which the instant suit is typical, the matter of burden of proof is not merely important but apt to be crucial.

Even assuming that Section 322 imposes a new burden on the Government—the duty, in ordinary circumstances, of disproving the correctness of the carrier's transportation charges—the decision below cannot be justified, we submit, for the burden of proof has here been extended, in conflict with settled principle, to the point where the Government has been required to offer the proof on a subject (availability of cars of the type ordered) as to which the adverse party, and not the Government, is chargeable with knowledge.

1. Section 322 assures to the carrier payment on presentation "prior to audit or settlement by the General Accounting Office." It further provides, however, that "the right is reserved to the United States Government to deduct the amount of any overpayments to any such carrier from any amount subsequently found to be due such carrier." The right thus explicitly reserved is scarcely meaningful if the

---

[4] See Appendix B, *infra*, p. 25, reproducing a letter from the Comptroller General to the Solicitor General, dated October 17, 1956, previously filed with this Court following the oral argument in *United States* v. *Western Pacific Railroad*, No. 18, this Term.

[5] Note that more than one million notices of overpayment, involving more than three hundred million dollars, were issued between 1948 and 1956. Appendix B, *infra*, p. 26.

making of the deduction fails to put the carrier to its proof that the original charges were correct. The apparent function of the reservation was to confirm the Government's right, if post-audit gave reason to believe that there had been an overcharge, to put itself in the very same position that it would have occupied had it discovered the error by a pre-audit. The new practice—post-audit rather than pre-audit—was designed to give the carrier the benefit of immediate payment, but without prejudice to the Government's right to put itself *in statu quo ante* in respect of those matters as to which subsequent audit showed error or probability of error.

Where the protection of the public treasury is involved, both Congress and the courts have been solicitous of the traditional right of the United States to require a full showing by the claimant. *Grand Trunk Western Railway Co.* v. *United States*, 252 U. S. 112, is strikingly analagous to the case at bar. There, the Postmaster General had concluded that for a period of twelve years the Government, as a result of a continuing mistake of fact, had overpaid Grand Trunk Western for the carriage of mail. The Postmaster General thereupon deducted from a current bill the amount of all prior overpayments. The carrier brought suit under the Tucker Act (as did the carrier here) challenging the deduction. In speaking for a unanimous Court, Justice Brandeis rejected the contention that the validity of the deduction should have been established by the Government before it was made, holding that the United States "was under no

obligation to establish the illegality [of the prior overpayments] by suit." 252 U. S. at 121. It is difficult to see why a different result should apply here—a situation in which Congress has authorized, in most explicit language, an administrative offset.

The strong policy that a claimant suing the United States must affirmatively establish the underlying facts is reflected in Rule 55 (e) of the Federal Rules of Civil Procedure. Under that Rule, a default judgment cannot be entered against the United States; the claimant must first establish "his claim or right to relief by evidence satisfactory to the court." This requirement, it is important to note, was originally imposed by Section 6 of the Tucker Act (Act of March 3, 1887, 24 Stat. 505, 506),* under which the instant suit was filed.

An examination of its legislative history shows that Section 322 was passed at the instance of common carriers to give them the benefit of prompt payment. In that history, there is not the slightest suggestion or intimation that the Government's rights would be altered by the use of a post-audit, rather than a pre-audit, procedure. It appears, on the contrary, that all concerned were of the view that the Government's position would be fully preserved in every respect by the reservation of the right to deduct from subsequent

* When the requirement was incorporated into the Rules, it was dropped from the Judicial Code. See Notes of Advisory Committee on Rules of Civil Procedure, S. Doc. No. 101, 76th Cong., 1st Sess., p. 271; H. Rept. No. 308, 80th Cong., 1st Sess., p. A 239.

bills any overpayment revealed by post-audit.[9a] The only inference which that history admits is that the carriers were to receive the benefit of immediate payments, but that the Government was to retain unimpaired the right to put the carriers to their proof whenever a post-audit revealed to the Comptroller General that there was a basis for doing so. We are appending (Appendix C, *infra*, pp. 27–32) a discussion which traces the various bills leading up to the enactment of Section 322 and undertakes to summarize the pertinent legislative history.

2. Even if the Government, contrary to the views expressed above, had an initial burden, its burden must be deemed satisfied by a showing that the carrier delivered cars of a type other than that which was ordered. The ruling below—that the Government was required to disprove the carrier's assertion that cars of the type ordered were unavailable—imposed on the shipper the burden of establishing facts peculiarly within the knowledge of the adverse party. The consistent holdings of this Court demonstrate that such a burden may not be imposed. *Selma, Rome &c. Railroad* v. *United States*, 139 U. S. 560, 566; *United States* v. *Denver & R. G. R. R.*, 191 U. S. 84, 91–92; *Commercial Corp.* v. *New York Barge Corp.*, 314 U. S. 104; *Federal Trade Commission* v. *Morton*

[9a] Thus, the carriers themselves, in seeking executive support for a change to a post-audit procedure, stated (see Appendix C, *infra*, p. 28): "In the event that this audit reveals an overpayment, then claim be presented to the carrier for the amount thereof which will be promptly paid by the railway, preserving, however, the right of the carrier to make further effort to recollect in the event that it does not believe the proper charges resulted from the Government's audit."

Salt, 334 U. S. 37, 44–45; *SEC* v. *Ralston*, 346 U. S. 119, 126.[7]

It is apparent from the very nature of the fact in issue here that the carrier, rather than the United States, must be assumed to know, or have access to, the pertinent information. *Atlantic Coastline R. R.* v. *United States*, 140 F. Supp. 569 (C. Cls.).[8] The record here (which was made on motions for summary judgment) precludes any other assumption. Uncontroverted statements show that the larger cars were "furnished for reasons peculiarly within the knowledge" of the respondent "and/or the initial carrier" and that the United States was "without knowledge of the reasons for the failure to furnish the [cars] ordered" (R. 24–25, 27, 28, 29, 30–31, 32). Similarly, the uncontroverted statements in the record show that the United States "is without knowledge of whether [cars] of the size * * * ordered * * * [were]

---

[7] In the *Denver & R. G. R. R.* case, this Court emphasized (191 U. S. 91–92):

"The practical injustice of a different rule * * *. It would require the plaintiff not only to establish a negative, that is, that the timber was *not* cut for the purpose of construction and repair, but to establish it by testimony peculiarly within the knowledge of the defendant. As the cutting in this case was done by agents and servants of the defendant, it would impose upon the plaintiff a difficult if not an impossible task to require them to show that the timber was not cut for the construction or repair of the railway, though evidence that it was so cut could be readily produced by the defendant. It is a general rule of evidence, noticed by the elementary writers upon that subject, 1 Greenl. Ev. sec. 79, 'that where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party.' * * *"

[8] In the cited case, the Court of Claims assumed (incorrectly, we believe) that the "Government * * * has the burden of

available to [respondent] and/or the initial carrier. Such information is peculiarly within the knowledge of [respondent] and/or the initial carrier * * *" (R. 24–25, 27, 28, 29, 30–31, 32)."

CONCLUSION

The court of appeals' interpretation of Section 322 of the Transportation Act of 1940, holding that the Government has the burden of proving the basis of an administrative offset made under that section, is erroneous and has substantial practical importance. The further holding that the Government's burden encompasses matters which are peculiarly within the

---

persuading us as to the validity of its offset." 140 F. Supp. 569, 572. However, the Court of Claims went on to recognize that "*as a practical matter, the evidence as to the availability of cars of the sizes ordered would be in the hands of the plaintiff railroad, and hence it was expected to give us all the information it had.*" 140 F. Supp. 569, 572. [Emphasis added.]

" In the face of the record, the court below had no warrant for assuming that respondent had no peculiar knowledge of non-availability of the cars ordered (App. A, p. 24). Moreover, the court's suggestion that the initial carrier, rather than respondent, had peculiar knowledge overlooks the fact that respondent, as the terminal and charge-collecting carrier, acts as agent for all of the connecting carriers and is therefore responsible for the production of records within possession of any of the carriers which have a bearing on the correctness of the charges collected. See note 2, p. 4.

Nor is it a relevant consideration that there may be an interval of several years between initial payment of the carrier's bill and completion of the General Accounting post-audit. Under the pre-1940 practice, an equivalent period elapsed during the pre-audit, *i. e.*, between presentation and payment of a transportation bill. This certainly did not lessen the carrier's obligation to prove the correctness of a bill challenged by the pre-audit. And if the present post-audit practice means that the

ambit of the carrier's knowledge and responsibility conflicts with settled principles. Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

RALPH S. SPRITZER,
Assistant to the Solicitor General.

MELVIN RICHTER,
MORTON HOLLANDER,
Attorneys.

NOVEMBER 1956.

---

carrier must retain for a longer time those records which will be necessary to justify its charges in the event that some question arises in relation thereto, any resulting disadvantage is far outweighed by the advantage accruing to it from the prompt receipt of payment following presentation and the use by the carrier of public funds to the extent that the bills include overcharges.

APPENDIX A

1. Opinion of the Court of Appeals

August 10, 1956

Magruder, *Chief Judge*. This is an appeal from a summary judgment in favor of the New York, New Haven and Hartford Railroad Company against the United States in the sum of $402.84. Though the amount involved is small, this is a test case, determination of which will settle the government's liability in a number of similar suits.

In 1953 plaintiff Railroad filed its complaint in the district court against the United States under the Tucker Act, 28 U. S. C. A. § 1346, demanding judgment in the amount of $1,143.03 as payment for transportation of a certain shipment of goods in 1950. A substitute answer filed by the United States admitted liability for the amount demanded under the 1950 shipment, but pleaded payment in full, by a check for $117.77 in 1951 and by credits of $1,025.26 on account of overpayments previously made in the settlement by the United States of four bills submitted by the plaintiff for transportation of goods in 1944—said credits being alleged to have been taken pursuant to § 322 of the Transportation Act of 1940 (54 Stat. 955). The answer contained this further allegation:

> The said overpayments represent for the most part the difference between charges resulting from the use for computation purposes of carload minimum weights based on the size of car furnished and used, and the charges resulting

407756—56——3

> from the use for computation purposes of carload minimum weights based on the size of car ordered by defendant and adequate for the shipment. Plaintiff at no time prior to, or subsequent to, the time of the filing of this suit furnished the defendant with facts with respect to its failure to provide defendant with the car ordered.

To this pleading the plaintiff filed an "answer" or reply, admitting the receipt of the check in the amount of $117.77 but denying that it had overcharged the United States with respect to the four shipments in 1944; "and the plaintiff further says that the defendant's determination of overpayment was arbitrary and capricious in that Service Order No. 68 as issued by the Interstate Commerce Commission on 30 January 1942 was in full force and effect and applicable thereto; and the plaintiff further says that it fulfilled its every obligation with respect to providing the defendant with any facts pertaining to such transportation."

It appears that with respect to the several shipments of naval property in 1944 the initial carriers had furnished on each occasion a freight car of greater length than that ordered in the bill of lading, and that the plaintiff, as the terminal carrier (*not* the railroad which furnished the cars) had collected from the government at the higher rates applicable to the size of car furnished rather than at the lower rates applicable to the smaller freight cars ordered.

There had been a long-standing unwritten rule that a carrier held itself out as being able to furnish the cars listed in its tariff, and so could not charge more when it furnished cars larger than those ordered. This rule was carried into § 6 (a) of Rule 34 of the rules of the ICC:

> If carrier is *unable* to furnish open car of length ordered, and furnishes longer car, mini-

> mum weight shall be that fixed for car *furnished, except* that if articles are of such length as could have been loaded on car of length ordered, minimum weight shall be that fixed for car *ordered*. [Italics added.]

Under the foreging rule it followed that, even if the carrier had been unable to supply the size of car ordered, it had to charge only for that size (provided, of course, that such a smaller car would have been big enough to carry the articles shipped). And if the railroad *was* able to furnish the car size ordered, but for its own convenience, or by error, it supplied a larger car (which would be an *a fortiori* case), § 6 (a) of Rule 34 by its terms might not apply, but the earlier general unwritten rule required the railroad to make only the charge applicable to the smaller size of the car ordered. In 1942, as a wartime measure to force shippers to make a fuller loading of cars, and thus to contribute to their more economical use, the ICC issued Service Order No. 68, above referred to, which, *inter alia*, suspended the provision of § 6 (a) of Rule 34 that had limited charges in the case of the substitution of a larger car to the amount chargeable for the smaller size car ordered. Thus, at the time in question here (1944), if the railroad was unable to furnish the size of car ordered, the railroad properly could bill the shipper for the size of car actually supplied. However, it was determined and we think correctly, in *Atlantic Coast Line R. Co. v. United States*, 112 F. Supp. 594, 125 Ct. Cl. 235, that where the carrier *was* able to furnish a car of the size ordered, but supplied a larger car, the proper billing was at the rate applicable to the car ordered. This was so because Service Order No. 68 purported only to suspend § 6 (a) of Rule 34, whose terms referred to the situation of a carrier who was *unable* to furnish what was ordered;

in the case of a carrier who was able, but did not, furnish the size of car ordered, the old case law rule still governed.

Thus it will be seen that for the year now in question the availability to the carrier of certain sizes of cars became the controlling question of fact in determining the validity of the charges on bills of lading in which the shipper had specified the use of a freight car of a certain size.

In the district court the plaintiff addressed a long list of interrogatories to the defendant, some of which were answered and some objected to. At a hearing on the defendant's objections, the district court ruled that the plaintiff need allege nothing beyond the facts of the particular 1950 shipment set forth in the complaint, the bill for which transportation the United States had refused to pay. The court's ruling is indicated by the following two paragraphs dictated by the judge at the conclusion of the hearing:

> The defendant contends that the plaintiff is not entitled to recover anything unless it shows that the government has not made overpayments on prior transportation contracts and designated bills which are referred to in defendant's answer.
>
> I rule as a matter of law that it is not the burden of the plaintiff to set forth in this complaint anything with respect to those prior transportation contracts; and it is not the burden of the plaintiff to make any showing that on an overall basis the government has not overpaid the plaintiff. This is a suit upon a particular contract of transportation. Other contracts claimed by way of setoff or otherwise must be set up in the defendant's answer and proved by the defendant.

Thereafter, the Railroad filed a motion for summary judgment, with an affidavit attached to the motion

indicating that through administrative negotiations it had accepted in part the credits asserted by the General Accounting Office, reducing its demand for judgment to the sum of $402.84. The United States moved for judgment in its favor on the ground that the Railroad had "failed to plead facts entitling it to recover herein." On November 23, 1955, the district court gave judgment for the Railroad in the amount of its reduced demand, at the same time denying defendant's motion for judgment. From this judgment the United States has taken the present appeal.

It seems to us that unless the Congress has definitely prescribed otherwise, the position of the United States as shipper, so far as the present case is concerned, is no different from that of a private shipper.

If a private shipper or consignee should pay the carrier before satisfying himself of the correctness of the charges demanded—as he may be required to do pursuant to § 3 (2) of the Interstate Commerce Act and regulations of the Commission thereunder—and later sues for a refund of alleged overpayments, or seeks to set off the amount of the overpayments against another claim admittedly due, in either case the shipper or consignee would have the burden of alleging and proving the fact and the amount of such overpayment.

On the other hand, if the private shipper or consignee should hold up payment of a shipping charge pending an audit to determine its correctness, and is thereupon sued by the carrier for the amount of the charge, of course the carrier would have the burden of alleging and proving the amount due.

Prior to 1940, the government, as shipper, followed the second of the foregoing courses. Payment by the government of transportation bills was accomplished in the same manner as for all other contracts

That is, an officer of the department concerned had to certify to a disbursing officer of his department that the bill was valid in all respects (service rendered, charges at lawful rate, computations correct, expenditure authorized by law, etc.), whereupon it would be paid. A bill that was doubtful in the eyes of the certifying officer would be forwarded to the General Accounting Office for its determination in advance of payment. See 1922, 33 Ops. Atty. Gen. 383. As a practical matter, it may be that the carriers were thus required to extend credit to the United States on account of shipping charges, though it seems that, under § 3 (2) of the Act, the carriers were not required by law to relinquish possession of the shipment at destination prior to payment.

In § 322 of the omnibus Transportation Act of 1940 (54 Stat. 955), the Congress enacted as follows:

> Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier * * * shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

The legislative history of § 322 furnishes no further light upon what the Congress may have had in mind with respect to the question before us, except that the inference is pretty clear that the section was remedial legislation passed at the behest of the carriers, who had complained of the inordinate delays of the pre-audit procedure theretofore prevailing which resulted in tying up large amounts of accounts receivable. See Hearings Before the House Interstate and Foreign

Commerce Committee on H. R. 10620, 75th Cong., 3d Sess. 35 (1938).

The United States urges us to read the last clause of § 322 as providing in effect that when an accounting officer, upon post-audit of a transportation charge, determines that a certain portion of the amount paid was an overcharge, he may direct the amount of such alleged overcharge to be set off against an amount subsequently found to be due to the carrier on another transaction; and that, when this is done, in order to recover the amount admittedly due on the subsequent transaction, the carrier must have the burden of alleging and establishing that there was no overpayment in the prior transactions used by the government by way of setoff.

We find no language in § 322 justifying this extraordinary result. All that § 322 does is to authorize and direct disbursing officers of the United States to pay transportation bills upon presentation, without waiting for audit or settlement by the General Accounting Office. This the United States might choose to do, just as a private shipper might pay the bills rendered by a carrier without making an audit.

Section 322 concludes with the words, "but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier." We suppose that this provision was inserted out of an abundance of caution, because the availability of a setoff by the United States need not depend upon specific statutory authorization. "It is but the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him." *Gratiot* v. *United States*, 1841, 15 Pet. 336, 370 * * *. See *Wisconsin Central R. Co.* v.

United States, 1896, 164 U. S. 190, 206–210 * * *. The quoted language of § 322 reserves the right to the United States to offset "the amount of any overpayment." This means that, before the claimed setoff must be accepted in a judicial proceeding, the existence of such overpayment must be objectively determined, in fact and in law; it is not enough merely that some accounting officer has unilaterally asserted the existence of such overpayment. In the case at bar, the General Accounting Office has not even determined that there had been such overpayments; it claimed a "credit" for the difference between the amounts properly chargeable for the use of the freight cars actually supplied by the initial carrier and the amounts properly chargeable for the freight cars of the sizes requested in the bills of lading. But as we have seen above, the difference between these two amounts was not necessarily an overcharge in 1944. Whether it was an overcharge or not depended upon the establishment of an extrinsic fact, namely, at the time and place, was the initial carrier able to supply freight cars of the smaller sizes ordered? But in answer to one of plaintiff's interrogatories, the defendant stated that it was "without knowledge of whether a car of the size in feet ordered by defendant was available to plaintiff and/or the initial carrier." In other words, the government's so-called post-audit did not undertake to determine the important extrinsic fact necessary to be established in order to sustain the claimed setoff.

In summary, we are in agreement with the very recent statement of the Court of Claims, in *Atlantic Coast Line R. Co.* v. *United States*, 1956, 140 F. Supp. 569, 572, that, "Since the Government is seeking to set off, against an admittedly valid claim, a claim which it asserts arises out of another trans-

action, it has the burden of persuading us as to the validity of its offset."

Though there is nothing in the terms of § 322 that lends support to the government's position, it would be well, perhaps, to mention another possibility, which has no relation to § 322. It might be that, though the United States has the ultimate burden of proof to establish overcharges in the 1944 transactions which it used as a setoff or "credit" in the present case, yet proof by the United States that the carrier had furnished and charged for cars of larger size than ordered by the bills of lading could be regarded as making out a prima facie case to establish the validity of the claimed credits, entitling the United States to the benefit of a rebuttable presumption that the carrier had available, and could have supplied, cars of the lesser size ordered, and thus was guilty of overcharges. If this were so, then the burden would have been upon the carrier to go forward with evidence tending to rebut the presumption, failing which the validity of the setoff or credit would have been established.

Of course, rules as to burden of proof, rebuttable presumptions, burden of going forward with the evidence, etc., are established as matters of fairness, and convenience or availability of proof.

In the present case, if the statistical chances pointed strongly to the likelihood that carriers, merely for their own convenience, frequently substituted larger cars for the smaller sizes ordered, it might be reasonable to have a rebuttable presumption to that effect. We gather from *Atlantic Coast Line R. Co.* v. *United States*, Ct. Cl. 1956 140 F. Supp. 569, 572, that this factual assumption was probably not so: that is, that it seemed to have been the practice of the carriers to furnish cars of the type ordered if such

cars were reasonably available; but the record now before us throws no light upon the point one way or the other.

Again, if evidence as to the availability, at the time and place of shipment, of cars of the size ordered was peculiarly within the knowledge of the carrier, it might be fair to impose upon the carrier the burden of coming forward with such evidence. That does not seem to be so in the case of the present appellee-plaintiff, which was the terminal carrier, not the initiating carrier. Also, in the circumstances of the present case, it is not clear to us that it would have been fair, even if the plaintiff had been the initiating carrier, to put upon such carrier this burden of going forward with the evidence on the point. We say this, because, due to the painfully slow pace of the post-audit by the General Accounting Office, it was not until 1950 that the government claimed a credit or offset on account of alleged overcharges in 1944—and such records as the carrier was required to keep, assuming they would have established whether smaller cars were available, were not required to be kept more than three years. See *Atlantic Coast Line R. Co.* v. *United States*, Ct. Cl. 1956 140 F. Supp. 569, 572.

On the whole, we do not think that the record before us contains sufficient information to enable us intelligently to prescribe a judicially made rule as to a rebuttable presumption. Besides, the relevant factors are so complex and debatable that we probably ought not, in any event, to apply a rule of rebuttable presumption, absent a prescription by the Congress on the subject.

The judgment of the District Court is affirmed.

2. JUDGMENT OF THE COURT OF APPEALS

August 10, 1956

This cause came on to be heard on the record on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

ROGER A. STINCHFIELD,
Clerk.

By /s/ DANA H. GALLUP,
Chief Deputy Clerk.

APPENDIX B

GENERAL ACCOUNTING OFFICE,
COMPTROLLER GENERAL OF THE UNITED STATES,
Washington 25, October 17, 1956.

B-118570
B-119225
B-120583

Re *United States* v. *Western Pacific Railroad* et al. (No. 18, October Term 1956 Supreme Court).

Honorable J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

DEAR MR. RANKIN: I understand that during the oral argument of the above case on October 15, 1956, the Chief Justice requested information as to (1) the

number of carrier bills postaudited annually by the Transportation Division of the General Accounting Office, and (2) the number of such bills with respect to which the postaudit revealed overpayments to carriers.

We are accordingly submitting the following chart showing the number of bills postaudited annually since April 1948, the total amounts involved in those bills, the number of notices of overpayment issued, and the total amounts stated as having been overpaid.

Date	Freight And Passenger Bills Postaudited		Overpayments Issued By General Accounting Office	
	Number	Amount	Number	Amount
4/48–6/30/48	370,548	$121,730,336	15,299	$1,259,289.17
7/1/48–6/30/49	825,660	263,356,528	50,779	12,844,004.48
7/1/49–6/30/50	745,250	524,167,503	77,774	19,828,337.52
7/1/50–6/30/51	2,435,832	1,295,514,850	132,058	32,899,560.40
7/1/51–6/30/52	3,193,989	1,923,938,300	174,464	44,361,365.17
7/1/52–6/30/53	2,802,744	1,916,460,033	163,995	42,799,104.84
7/1/53–6/30/54	2,563,401	1,878,773,426	180,043	48,636,165.66
7/1/54–6/30/55	2,544,383	1,861,786,721	171,707	51,254,358.73
7/1/55–6/30/56	1,738,976	1,900,266,315	136,535	70,598,497.27
Total	17,220,783	$11,625,994,048	1,102,654	$326,880,874.24

We regret that similar information for the period prior to April 1948 is not available at the present time.

For your convenience we are enclosing 25 copies of this letter.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

Enclosure.

APPENDIX C.

Discussion of Background and History of Section 322 of the Transportation Act of 1940

In the late 1930's, the railroads were in critical financial condition. H. Doc. No. 583, 75th Cong., 3d Sess., pp. 1–2; S. Rept. 433, 76th Cong., 1st Sess., pp. 1–2; Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 2531, January 24, 1939, p. 17. In part, this condition was attributed by the railroads to the prevailing governmental practice of not paying transportation bills upon presentation, as is required of private shippers. Section 3 (2), Interstate Commerce Act, 24 Stat. 380, as amended, 49 U. S. C. 3 (2).[1] The railroads pointed out that payment was deferred by the Government until a pre-audit had been completed by the General Accounting Office, and that this tied up large sums of money.

The dissatisfaction by the railroads with the pre-audit practice was reflected in many industry publications. A 1938 editorial in *The Traffic World*, a leading transportation journal, in referring to the delays incident to the payment of freight bills because of the pre-payment audit procedure, declared:

> We should say that the very least that could be done by an administration that * * * pretends especially to be interested in the welfare of the railroads, would be to pay them what it owes them with some degree of promptness.[2]

---

[1] By its terms, Section 3, (2) is inapplicable to transportation services furnished to governmental units.

[2] *The Traffic World*, June 11, 1938, p. 1353. See also, for further evidence of the industry's continuing concern regarding prepayment audit, the following issues of the same publication: June 4, 1938, p. 1310; January 14, 1939, pp. 62, 94; September 14, 1940, p. 615.

At about the same time, the Association of American Railroads wrote to the Procurement Division of the Department of the Treasury. In its letter,[3] the Association described the delays faced by the carriers in obtaining payment for Government transportation services, showed why these delays were subjects of particular concern, and then recommended:

> We believe that the delay in the payment of transportation charges by the Government to the railroads would be absolutely avoided if the various departments contracting for transportation were instructed to pay the bills as rendered and after payment have these bills referred to the General Accounting Office or such other governmental auditing office as might be desired for audit. *In the event that this audit reveals an overpayment, then claim be presented to the carrier for the amount thereof which will be promptly paid by the railway, preserving, however, the right of the carrier to make further effort to recollect in the event that it does not believe the proper charges resulted from the Government's audit.* Attention is further directed to the fact that the railroads would never have, under such a plan, more money than the Government lawfully owed for the reason that the Government is shipping daily and is currently obligated to the railroad companies for transportation charges. This would place the handling of governmental transportation charges on substantially the same basis as applies in connection with commercial transactions.
>
> I am very sure from our previous negotiations with you and others connected with the

[3] Letter of October 5, 1937, from Association of American Railroads to Procurement Division, Treasury Department.

Government with regard to the same subject that there exists no differences as between us as to the necessity of more prompt payment than has heretofore prevailed. I hope that you and your associates may consider the suggestions contained herein as reasonable and practical and that we may rely upon your good offices to bring about some such arrangement. [Emphasis added.]

Shortly after receipt of this letter, S. 3876, 75th Cong., 3d Sess., was introduced in the Senate. In embodying the Railroad Association's recommendation it provided, in Section 2, that:

> * * * Payment for the transportation of any such persons or property shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

On June 1, 1938, R. V. Fletcher, the General Counsel of the Association of American Railroads, testified before the House Committee on Interstate and Foreign Commerce in connection with another transportation bill, H. R. 10620, 75th Cong., 3d Sess. In the course of his testimony, Mr. Fletcher called the Committee's attention to Section 2 of S. 3876 and stated:

> Now, if Congress could be persuaded to pass that section or to incorporate that section in this bill, it would relieve the railroads from a very embarrassing situation growing out of the fact, * * * that the Government always owes the railroads a very considerable amount of money due to the delay in having their bills checked and audited and approved by the General Accounting Office.

> * * *. frequently 10, 15, or 20 million dollars are tied up for a considerable period of time over in the General Accounting Office awaiting a careful preaudit of those bills, while under the law other shippers must pay upon presentation of bills or delivery of the freight within a period of 3 or 4 days.
>
> The Government pays its bills to the railroads only after this careful check and preaudit, which causes a lot of delay in the payment of bills and ties up a great deal of money badly needed by the railroads. If that section could be put in here, it would require the payment of the bills by the Government as they are rendered by the railroads, with the privilege, however, of course, if it should develop that there has been an overpayment, the Government may deduct that amount from subsequent bills.[4]

Neither H. R. 10620 nor S. 3876 was enacted by the 75th Congress. In the 76th Congress, however, several bills were introduced in both Houses incorporating the provisions of Section 2 of S. 3876. Some of these bills, in common with the earlier bills, dealt exclusively with the transportation of Government property.[5] Others were omnibus transportation bills, of which only some provisions related to Government transportation.[6] One of the latter was drafted by,

---

[4] Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 10620, 75th Cong., 3d Sess., June 1, 1938, pp. 34–35.

[5] See, *e. g.*, S. 1915, 76th Cong., 1st Sess., introduced March 23, 1939 [84 Cong. Rec. 3143]; S. 1990, 76th Cong., 1st Sess., introduced March 30, 1939 [84 Cong. Rec. 3509]. Section 2 of both of these bills dealt with the payment of transportation bills upon presentation.

[6] See *e. g.*, H. R. 2531, 76th Cong., 1st Sess., introduced January 13, 1939 [84 Cong. Rec. 345]; H. R. 4862, 76th Cong., 1st Sess., introduced March 8, 1939 [84 Cong. Rec. 2312]. Section

and introduced at the behest of, representatives from railroad management and labor and was familiarly known as the "railroad bill".[7]

Mr. Fletcher again testified before the House Committee on Interstate and Foreign Commerce on behalf of the American Association of Railroads and urged the passage of the provision in H. R. 2531 pertaining to Government payment upon presentation of charges. See Hearings before House Committee on Interstate and Foreign Commerce on H. R. 2531, 76th Cong., 1st Sess., February 24, 1939, pp. 652–653. And at the same hearing, a representative of the trucking industry called upon the Committee to broaden the provision so as to encompass motor carriers as well, observing that (*id.*, p. 472):

> * * * Some of our carriers have had to wait from 6 months to a year to get their money from the Government. We want to be accorded the same treatment you give the railroads.

Unlike the above bills (none of which was enacted), the bill which eventually became the Transportation Act of 1940 did not, in its original form, contain any provision respecting Government traffic. This bill, S. 2009, 76th Cong., 1st Sess., was introduced March 30, 1939, and reported out by the Senate Committee on Interstate Commerce, six weeks later, without any prompt payment provision, S. Rept. 433, 76th Cong., 1st Sess. However, in the House, the Committee on Interstate and Foreign Commerce added the payment-

---

501 of H. R. 2531 and Sections 201 and 202 of H. R. 4862 concerned Government traffic. Their provisions were substantially the same as the provisions in S. 1915 and 1990, n. 5, *supra*, p. 30, H. R. 1862, n. 6, *supra*, p. 30. See Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives on H. R. 4862, 76th Cong., 1st Sess., March 7–30, 1939, p. 1101.

upon-presentment-prior-to-audit provision as Section 322. The Committee's explanation of the addition was simple: "Section 322 provides for prompt payment to any common carrier subject to the Interstate Commerce Act for transportation of persons or property for the United States and includes a provision for deduction of overpayments." H. Rept. 1217, 76th Cong., 1st Sess., p. 28.

The addition survived two subsequent joint conferences (H. Rept. 2016, 76th Cong., 3d Sess.; H. Rept. 2832, 76th Cong., 3d Sess.) and, on September 18, 1940, Section 322 was enacted in its present form, see p. 3, *supra*.

At no place in the hearings, reports, or debates on Section 322 or its counterpart provisions in earlier bills was it suggested that the Section was designed to shift the burden of proof in cases involving carrier claims against the United States from the carrier to the Government. To the contrary, the legislative history discloses a single and abiding congressional purpose: to confer on the carriers the benefit of prompt payment by eliminating the General Accounting Office pre-audit and, at the same time, to protect the Government against damage from overpayment by explicit reservation of the right, after audit, to deduct overpayments from bills later submitted by the carriers.

U. S. GOVERNMENT PRINTING OFFICE: 1952